

1
2
3
4
5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8
9

10 SUZY BISHARA,
11 Plaintiff,
12 v.
13 BAC HOME LOANS AND
14 COUNTRYWIDE HOME LOANS, *et al.*,
15 Defendants.

16 Case No. 2:11-CV-01420-KJD-GWF

17 **ORDER**

18 Presently before the Court is the Motion to Dismiss (#8) filed by Defendants BAC Home
19 Loans (“BAC”) and Countrywide Home Loans (“Countrywide”)(collectively “Defendants”). Plaintiff
20 filed a response in opposition (#14) to which Defendants replied (#17). Also before the Court is
21 Defendants’ Motion to Expunge Lis Pendens (#10) to which Plaintiff filed a response (#15).

22 **I. Background**

23 Plaintiff Suzy Bishara purchased property at 9120 Nicklewood Ave, Las Vegas Nevada (the
24 “Property”) on January 12, 2006 with a loan for \$328,000 from Countrywide and secured this loan
25 with a Deed of Trust encumbering the Property.

26 According to the allegations of the complaint, Plaintiff defaulted on or about November 1,
27 2008. On March 5, 2009, ReconTrust Company, N.A. (“ReconTrust”), acting as agent for the

1 beneficiary, filed a Notice of Default and Election to Sell. On April 18, 2011, Mortgage Electronic
 2 Registration Systems, Inc. (“MERS”) assigned its interest as beneficiary under the Deed of Trust to
 3 BAC. Subsequently, ReconTrust filed a Nevada Notice of Trustee’s Sale recorded on July 20, 2011
 4 in the Clark County Recorder’s office.

5 On April 13, 2011, Plaintiff filed a Complaint in State Court, which was subsequently
 6 removed (#1-1) on September 2, 2011. The Complaint contains claims for wrongful foreclosure, civil
 7 conspiracy, quiet title, and declaratory relief. Defendants have now moved to dismiss for failure to
 8 state a claim upon which relief may be granted.

9 II. Discussion

10 A. Legal Standard for Motion to Dismiss

11 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
 12 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937,
 13 1949 (2009)(citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Plausibility, in the
 14 context of a motion to dismiss, means that the plaintiff has pleaded facts that allow “the court to
 15 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft, 129
 16 S. Ct. at 1949. The Iqbal evaluation illustrates a two-prong analysis. First, the court identifies “the
 17 allegations in the complaint that are not entitled to the assumption of truth,” that is, those allegations
 18 which are legal conclusions, bare assertions, or merely conclusory. Ashcroft, 129 S. Ct. at 1949-51.
 19 Second, the Court considers the factual allegations “to determine if they plausibly suggest an
 20 entitlement to relief.” Ashcroft, 129 S. Ct. at 1951. If the allegations state plausible claims for relief,
 21 such claims survive the motion to dismiss. Ashcroft, 129 S. Ct. at 1950.

22 Plaintiff is representing herself *pro se*. Courts must liberally construe the pleadings of *pro se*
 23 parties. See United States v. Eatinger, 902 F.2d 1383, 1385 (9th Cir. 1990). However, “*pro se*
 24 litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of
 25 record.” Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th Cir. 1986).

26 ///

1 B. Wrongful Foreclosure

2 To establish a claim for wrongful foreclosure, Plaintiff must allege: 1) defendant exercised a
3 power of sale or the foreclosure occurred; and 2) at the time of the foreclosure, plaintiff did not cause
4 a breach of condition or failure of performance that would have authorized a foreclosure. Collins v.
5 Union Fed. Sav. & Loan Ass'n, 662 P.2d 610, 623 (Nev. 1983). "In alleging fraud or mistake, a
6 party must state with particularity the circumstances constituting fraud or mistake." Fed R. Civ. P.
7 (9)(b). To allege fraud, a plaintiff must demonstrate that: 1) defendant made a false representation; 2)
8 defendant knew it was false; 3) defendant intended to induce a reliance on the misrepresentation; 4)
9 plaintiff justifiably relied on the misrepresentation; and 5) plaintiff suffered damages as a result of
10 the reliance. Nau v. Sellman, 757 P.2d 358, 360 (1988). Fraud must be pled with particularity
11 including allegations of the time, place, nature of the fraud, and specific parties involved.
12 Neubronner v. Milliken, 6 F.3d 666, 671 (9th Cir. 1993). It is not required that the complaint
13 describe in detail every single transaction. However, the complaint must identify the circumstance of
14 the alleged fraud so that defendants can prepare an adequate answer. Cooper v. Pickett, 137 F.3d
15 616, 627 (9th Cir. 1997). "Fraud cannot be predicated upon misrepresentations of law or
16 misrepresentations as to matters of law." Miller v. Yokohama Tire Corp., 358 F.3d 616, 621 (9th
17 Cir. 2004).

18 Plaintiff seems to allege that Defendants fraudulently executed the Assignment of Deed of
19 Trust and the Notice of Default. In Nevada, the trustee is authorized to exercise the power of sale
20 after a breach of the obligation. Nev. Rev. Stat. §107.080. ReconTrust is the trustee under the terms
21 of the Deed of Trust and has the right to exercise a power of sale and file a Notice of Default upon
22 the Property. See Nev. Rev. Stat. §107.080(1); see also Request For Judicial Notice, Ex. A, Doc. No.
23 7-1. A beneficiary has the power to record a notice of breach and of the election to sell or cause to be
24 sold the property to satisfy the obligation. Nev. Rev. Stat. §107.080(2)(c). BAC was assigned all
25 beneficial interest that MERS possessed as the beneficiary to the Deed of Trust according to the
26 Corporation Assignment of Deed of Trust. See Nev. Rev. Stat. §107.080(2)(c); see also Request For

1 Judicial Notice, Ex. C, Doc. No. 7-1. The Court cannot find any deficiency in the assignment of the
2 Deed of Trust, the Notice of Default, or the Notice of Sale. Each party was authorized and had
3 authority to take the actions they did.

4 However, Plaintiff has alleged that she was not in default. Nevertheless, since no foreclosure
5 has taken place, there can be no claim for wrongful foreclosure. Additionally, Plaintiff has failed to
6 provide essential information required to state a claim for fraud. Construing Plaintiff's *pro se*
7 Complaint liberally, the only surviving claim is for breach of contract since Plaintiff is asserting that
8 she was not in default and, therefore, the actions taken to foreclose were in breach of the note and
9 Deed. Accordingly, the claim for wrongful foreclosure is dismissed.

10 Plaintiff's best remedy would have been to seek her right to mediation through the Nevada
11 Foreclosure Mediation Program. Nev. Rev. Stat. §107.086. Once a trustee records the notice of
12 default, a trustee must then send the mortgagor a form which allows him to elect mediation. The
13 mortgagor then has 30 days after service of the notice of default to return the form to the trustee
14 indicating his selection. Nev. Rev. Stat. §107.086(2)(a). Nevada Assembly Bill 149 amends Chapter
15 107 by adding a requirement that if the grantor or person holding title of record notifies the trustee
16 that they seek mediation, the power of sale will be stayed until completion of the mediation program.
17 The mediation requires the beneficiary of the deed of trust or representative to appear at the
18 mediation with the original or certified copy of the deed of trust, the mortgage note, and each
19 assignment of the deed of trust or mortgage note. See 2009 NV A.B. 149. Nevada Seventy-Fifth
20 Regular Session. The record is silent as to whether Plaintiff requested her right to mediation. Plaintiff
21 could have sought relief in state court, if the opposing parties had failed to produce documentation
22 substantiating their claim of authority to proceed with foreclosure or had otherwise failed to mediate
23 in good faith.

24 D. Civil Conspiracy

25 To prove civil conspiracy, a plaintiff must demonstrate that the defendants: 1) were part of a
26 combination of two or more persons; 2) who intended to achieve an unlawful objective for the

1 purpose of harming another; and 3) damage resulted from the action. Hilton Hotels v. Butch Lewis
 2 Productions, 862 P.2d 1207, 1210 (1993)(citing Sutherland v. Gross, 772 P.2d 1287, 1290 (1989)).

3 Plaintiff's claim for civil conspiracy fails because she fails to provide a short plain statement
 4 that demonstrates why she is entitled to relief. Fed. R. Civ. P. (8)(a). Further, since the Defendants
 5 had authority to record the Notice of Default and Assignment of Deed of Trust without more factual
 6 allegations, Plaintiff has failed to state a claim. Accordingly, Plaintiff's claim for civil conspiracy is
 7 dismissed.

8 E. Quiet Title

9 In Nevada, a quiet title action may be brought by someone who claims an adverse interest in
 10 property. Nev. Rev. Stat. 40.010. "In a quiet title action, the burden of proof rests with the plaintiff to
 11 prove good title in himself." Brelian v. Preferred Equities Corp., 112 Nev. 663, 918 P.2d 314, 318
 12 (Nev.1996). A plaintiff must allege that he has paid any debt owed on the property. See Ferguson v.
 13 Avelo Mortgage, LLC, No. B223447, 2011 WL 2139143, at *2 (Cal. App. 2d June 1, 2011). The
 14 recorded titleholder is presumed to be the true titleholder. This presumption must be overcome by the
 15 plaintiff. Biasa v. Leavitt, 692 P.2d 1301, 1304 (1985). Further, Courts have held that an action for
 16 quiet title "should be dismissed where plaintiff's claim is not based on a cognizable legal theory."
 17 Elias v. HomeEQ Servicing, 2009 WL 481270, at *2 (D.Nev. Feb. 25, 2009).

18 Plaintiff acknowledges that she executed loan documents that encumbered the Property with
 19 a Deed of Trust held by the Defendants and has failed to allege that the encumbrance has been
 20 satisfied or removed from the Property. Finally, Plaintiff has failed to provide a "short and plain
 21 statement of the claim" which alleges an alternative party claims title to the Property. Fed. R. Civ. P.
 22 (8)(a). Accordingly, Plaintiff's claim must be dismissed.

23 F. Declaratory and Injunctive Relief

24 Declaratory or injunctive relief is not a separate cause of action or an independent ground for
 25 relief. See in re Wal-Mart Wage & Hour Employ. Practices Litig., 490 F.Supp.2d 1091, 1130
 26 (D.Nev. 2007). Plaintiff has not moved separately in accordance with the Federal Rules of Civil

1 Procedure. Fed. R. Civ. P. (65). Accordingly, Plaintiff's claims for declaratory and injunctive relief
2 are dismissed.

G. Summary

It has been demonstrated that there are no deficiencies in the assignment of the Deed of Trust, the Notice of Default, or the Notice of Sale. The claim for wrongful foreclosure is dismissed because foreclosure has not taken place. Claims for civil conspiracy, fraud, quiet title, and declaratory judgment lack merit for the foregoing reasons. Construing Plaintiff's *pro se* Complaint liberally, the only surviving claim is for breach of contract because Plaintiff asserts that she was not in default when the Notices were recorded.

III. Conclusion

Accordingly, **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (#8) is **GRANTED in part** and **DENIED in part**;

IT IS FURTHER ORDERED that Defendants' Motion to Expunge Lis Pendens (#10) is **DENIED**.

DATED this 5th day of June 2012.

Kensal

Kent J. Dawson
United States District Judge